

SERVED: July 19, 1993

NTSB Order No. EA-3936

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of June, 1993

JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Docket SE-12704
)	
JAMES M. SWANN,)	
)	
Respondent.)	

ORDER DENYING INTERLOCUTORY APPEAL

Chief Administrative Law Judge William E. Fowler, Jr., consented to respondent's unopposed request for interlocutory review of the law judge's denial of respondent's motion to dismiss the Administrator's complaint as stale.¹ For the reasons that follow, we will deny the appeal.²

¹The law judge's orders pertinent to the instant appeal are attached.

²Respondent filed his appeal brief on March 3, 1993, and the Administrator received it on March 8, 1993. Pursuant to the law judge's briefing schedule, the reply brief would have been due on Monday, March 15, 1993. On March 19, 1993, the Administrator served a motion for permission to file late the accompanying reply brief. As it appears that there was no good reason for the untimely brief and belated motion, the motion is denied, and the Administrator's reply brief has not been considered.

Under the Board's stale complaint rule, if the complaint does not allege lack of qualification, it is subject to dismissal where it states allegations of offenses that occurred more than 6 months before the Administrator advises the certificate holder as to the reasons for the proposed certificate action. 49 C.F.R. § 821.33(a). The vehicle the Administrator uses for advising certificated persons of the allegations is the Notice of Proposed Certificate Action (NOPCA), and the certificate holder is notified upon actual or constructive receipt of the NOPCA. Administrator v. Parish, 3 NTSB 3474 (1981). The NOPCA was dated April 24, 1990 and served on respondent that date by Certified Mail and Airborne Express Mail (next day delivery). The NOPCA served by Airborne Express should have been received by respondent on Wednesday, April 25, 1990, and respondent does not contend that he did not receive the NOPCA on that date. Therefore, we will treat April 25, 1990 as the date of at least constructive receipt of the NOPCA.³

Respondent's motion to dismiss the complaint as stale asserts that "the final day of the six-month period in this case was April 24, 1990 (i.e. six months from October 25, 1989)." Applying the Board's rule on the computation of time,⁴ the law judge correctly decided that the day of the event (October 25) is not counted in the calculation.⁵ The law judge concluded that

³The NOPCA alleged that on or about October 25, 1989, respondent performed maintenance on the right elevator and trim tab system of a Beech aircraft (model BE-58P) and failed to install properly bolts in the right elevator trim tab actuator forward bearing retainer plate. The Order of Suspension is dated July 22, 1992 and repeats these allegations.

⁴49 C.F.R. § 821.10 provides in pertinent part:

"§ 821.10 Computation of time.

In computing any period of time prescribed or allowed by this part, by notice or order of the Board or a law judge, or by any applicable statute, the date of the act, event, or default after which the designated period of time begins to run is not to be included in the computation. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or legal holiday for the Board, in which event the period runs until the next day which is neither a Saturday, Sunday, nor legal holiday."

⁵Respondent asserts that the law judge erred by applying the Board's "internal rules [§ 821.10] for the computation of time. This attempt to use procedural rules to justify a substantive matter of law is both unprecedented and illogical." Respondent's Appeal Brief at 4, emphasis in the original. Respondent need look no further than Administrator v. Garvin, NTSB Order EA-3182,

six months from October 26, 1989 was April 25, 1990; and since respondent received the NOPCA on that date, the complaint was not stale. Respondent has shown no error in the law judge's well-reasoned order.

ACCORDINGLY, IT IS ORDERED THAT:

1. The interlocutory appeal is denied; and
2. The law judge's order denying respondent's motion to dismiss the complaint as stale is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above order.

(..continued)

served August 6, 1990, a case he cites in his brief, to see that the Board has itself applied Rule 10 in deciding a stale complaint issue. The law judge's reliance on Rule 10 is thus consistent with precedent. Moreover, the actual language of Rule 10 makes clear that it is applicable to "any period of time prescribed or allowed by this part."